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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re QCA Spas, Inc.

Serial No. 78295396

Timothy J. Zarley of Zarley Law Firm, P.L.C. for QCA Spas, Inc.

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(Andrew Lawrence, Managing Attorney).

Before Hohein, Bucher and Grendel, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

QCA Spas, Inc. has filed an application to register on the Principal Register the mark "SPA BREEZE" for "chemicals for treating spas, namely, chlorine, water shock chemicals, water clarifiers, [and] bromine tablets" in International Class 1.¹

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the mark "POOL BREEZE," which is registered on the Principal Register for "pool care chemicals for swimming pools, namely[,] chlorine,

¹ Ser. No. 78295396, filed on September 3, 2003, which is based on an allegation of a date of first use of such mark anywhere and in commerce of September 1, 2003. The word "SPA" is disclaimed.

water stabilizers, water clarifiers, water shock chemicals, metal removing agents, and water testing kits comprised of reagents and/or test strips" in International Class 1,² as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity in the goods at issue and the similarity or dissimilarity of the respective marks in their entireties.³

Turning first to consideration of the respective goods, applicant asserts in its initial brief that there is a "significant difference" between its "chemicals for treating spas" and registrant's "pool care chemicals for swimming pools" in that "[a]pplicant's mark is directed toward a separate and

² Reg. No. 1,939,190, issued on December 5, 1995, which sets forth a date of first use anywhere and in commerce of October 1, 1992; combined affidavit §§8 and 15. The word "POOL" is disclaimed.

³ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." 192 USPQ at 29.

distinct group of consumers, namely[,] those owning spas, while the registered mark is directed toward consumers owning swimming pools." Applicant maintains, in light thereof, that the Examining Attorney has offered no evidence to demonstrate that the respective goods would be considered commercially related in the minds of such consumers, arguing that:

To establish a likelihood of confusion, the Examining Attorney must do more than simply state that "the goods are related because they are chemicals that are related to pools and spas". Rather, to establish likelihood of confusion one must show "something more" than that the marks are used on related goods. In re Coors Brewing Co., 343 F.3d 1340, 1345[, 68 USPQ2d 1059, 1063] (Fed. Cir. 2003) (overturning Board's holding that food product and restaurant service were related). Here, the Examining Attorney has provided no evidence to support his conclusion that consumers are likely to conclude that spa chemicals and pool chemicals with marks different in appearance and sound, emanate from the same source. Nor has the Examining Attorney provided any evidence that the registrant's customers would be prospective consumers of Applicant's goods.

The Examining Attorney, on the other hand, insists in his brief that "there is every indication that the same consumer would encounter the applicant's goods ... in the same trade channels as the registrant's goods." As support for such statement, the Examining Attorney notes that he has made of record copies of "third-party registrations of marks used in connection with the same or similar goods as those of applicant and registrant in this case." Such copies, the Examining Attorney maintains, "have probative value to the extent that they

serve to suggest that the goods listed therein, namely[,] water clarifiers, shock treatment chemicals and/or chlorine for both swimming pools and spas, are of a kind that may emanate from a single source" and thus evidence that "the applicant's goods and those of the registrant are related."

While the Examining Attorney has made no mention of applicant's contention that the record must show "something more" in order to support a finding that the goods at issue are commercially related, we note that applicant's reliance on *In re Coors Brewing Co.*, supra, is misplaced. Such case, which involved beer and restaurant services, is clearly limited by its facts to, among other things, a determination that there was not "substantial evidence" to support the finding by the Board majority that the judicially imposed requirement, originally set forth in *Jacobs v. International Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982), that "[t]o establish likelihood of confusion a party must show something more than that similar or even identical marks are used for food products and for restaurant services" had been met. Here, in sharp contrast, this appeal involves applicant's "chemicals for treating spas, namely, chlorine, water shock chemicals, water clarifiers, [and] bromine tablets," on the one hand, and registrant's "pool care chemicals for swimming pools, namely[,] chlorine, water stabilizers, water clarifiers, water shock chemicals, metal removing agents, and water testing kits comprised of reagents and/or test strips", on the other. As the Examining Attorney accurately observes in his brief, applicant's goods and registrant's goods not only "are

chemicals," but, even though the former are for treating spas while the latter are for use in swimming pools, "[a]t least to the extent that applicant's identification of goods contains chlorine, water clarifiers and water shock chemicals, its goods are identical to those of the registrant."

Moreover, and in any event, it is well established that the goods at issue need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. Instead, it is sufficient that the respective goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978) and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978). Here, contrary to applicant's assertion, there is evidence in the record which, as the Examining Attorney emphasizes, is sufficient to demonstrate that applicant's goods are commercially related to those of registrant, such that their marketing under the marks at issue would be likely to cause confusion as to origin or affiliation.

Specifically, as alluded to by the Examining Attorney, it is settled that while use-based third-party registrations are not proof that the different marks shown therein are in use or that the public is familiar with them, it nevertheless is the

case that such registrations are evidence in that they may have some probative value to the extent that they serve to suggest that the various goods listed therein are of the kinds which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993); and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 at n.6 (TTAB 1988), *aff'd as not citable precedent*, No. 88-1444 (Fed. Cir. Nov. 14, 1988). In this case, the Examining Attorney has made of record a dozen use-based third-party registrations pertaining to marks for various chemical products for both pools and spas. Included in the goods listed therein are the following: "liquid chlorine as used in swimming pools, spas, and the like"; "chemicals for swimming pools and spas, namely, clarifiers, peroxide shocks, ... and pH balancers, and stabilizers"; "chlorine for use in swimming pools and spas"; "water treatment chemicals for spas ... and pools--namely, clarifier and algae inhibitor[s] ..."; "chemicals for swimming pools and spas, namely, clarifiers, peroxide shocks ... and bromine removers"; "non-chlorine chemical shock treatment for swimming pools and spas"; "water purifying or treatment chemicals for swimming pools and spas, namely, chlorine"; "water treatment chemicals for swimming pools and spas, namely, stabilizers ... and shock treatment chemicals"; "chemical preparation for use as a chlorine reducer, pH stabilizer ... and water clarifier in swimming pools ... and spas"; and "non-chlorine water purification compounds for pools, spas, fountains and drinking water."

Such registrations thus evidence that various chemical water treatment products for swimming pools are commercially related to their counterpart products for spas in that purchasers thereof, including such ordinary consumers as homeowners, would be accustomed to finding the respective goods marketed under the same marks through the same or similar channels of trade.⁴ We note in this regard that it would not be uncommon for homeowners, for example, to have at their residences both a swimming pool for exercising and swimming and a spa for relaxing and soaking. Plainly, homeowners would need water treatment chemicals for use therewith and it is clear that, except for the fact that applicant's goods are directed for use in spas while registrant's goods are sold for use in swimming pools, that the nature and use of the respective goods are essentially the same. Accordingly, the goods at issue herein must be considered commercially related in that they would be sold through the same or similar channels of trade to the same classes of purchasers, such that the sale

⁴ Applicant, with its reply brief, has attached a copy of registrant's webpage as well as a copy of pages from applicant's website. Applicant maintains that such evidence shows that registrant, on the one hand, "sells only products sold for swimming pools and does not sell any products for spas," while applicant, on the other hand, "sells only spas and spa chemicals and does not sell any type of pool chemicals." According to applicant, such evidence therefore establishes that "the Applicant and Registrant are selling their goods in different channels of trade and the cross-over of consumers would be *de minimus*." The evidence attached to applicant's reply brief, however, is untimely under Trademark Rule 2.142(d) and will not be further considered inasmuch as the Examining Attorney has had no opportunity to refute such. Nonetheless, we note that even if such evidence were to be treated as being properly of record, it would not establish that goods of the kinds marketed by applicant and those of the types sold by registrant do not generally travel in the same channels of trade to different classes of purchasers or that customers do not cross shop different retailers for such products.

and/or advertising thereof under the same or similar marks would be likely to cause confusion as to source or sponsorship.

Turning, then, to consideration of the marks at issue, applicant argues that, when considered in their entirety, the marks "SPA BREEZE" and "POOL BREEZE" are not similar in sound, appearance or meaning. Applicant, in particular, faults the Examining Attorney in stressing the fact that the respective marks share a word which is preceded by a descriptive term, asserting in its initial brief that:

In rejecting Applicant's mark, the Examining Attorney found the term "Breeze" to be the dominant portion of the mark, and giving greater weight to this term concluded that Applicant's mark and the registered mark are very similar. In this manner, the Examining Attorney has improperly dissected the marks. Rather, the Examining Attorney has only considered the similar commercial impression of part of the marks--the shared word "Breeze"--before concluding that the marks were similar.

Moreover, although the Examining Attorney noted that it is proper to give greater weight to the term "Breeze" on the ground that the Applicant merely dropped the descriptive term "pool" and added the descriptive term "spa," such analysis still fails to consider the sound or appearance of the marks as a whole. By indicating that more weight is given to a particular component of the mark, this does not excuse consideration of the other components of the mark as a whole. The ultimate conclusion of similarity or dissimilarity of the marks must rest on consideration of the marks in their entirety.

Applicant additionally maintains that "it is well established that where marks, similar wholly or in part, are used by third parties in the same field, the owner's mark tends to be

weak as an indicator of a single source; it is therefore entitled to a narrow scope of protection." As applicant correctly notes:

Third[-]party registrations may be used effectively to show that a mark is inherently weak, by showing that different entities have adopted and registered marks in a particular field, and that the PTO has allowed the registration of marks over one another despite the fact that they have some points of similarity. Clinton Detergent Co. v. Proctor & Gamble Co., [302 F.2d 745,] 133 USPQ 520 (CCPA 1962). For instance, when a PTO trademark application is refused because of a prior registration, the Applicant can effectively argue that its mark is no more likely to cause confusion with the registered mark than the registered mark is likely to be confused with one or more other registered marks, all of which include the common element. [Citations omitted.]

Here, applicant points out, it has made of record information concerning the following third-party registrations: (i) Reg. No. 2,693,895 for the mark "OCEAN BREEZE for "pool chemicals"; (ii) Reg. No 2,388,290 for the mark "WESTERNBREEZE" for "preparations and chemical reagents for use in biological and life sciences research"; (iii) Reg. No. 2,123,122 for the mark "CRYSTAL BREEZE" for "electronic air and water purification units for domestic use"; and (iv) Reg. No. 1,823,870 for the mark "CATCH THE BREEZE" for "aerated water." Applicant insists that "[t]he fact that 'BREEZE' is part of several federal registrations for related goods ... demonstrates that 'BREEZE' has weak trademark significance in the field" and that, accordingly, "applicant's use of 'BREEZE' is no more likely to cause confusion with [the cited registrant's mark] ... than these marks are likely to cause confusion with other previously existing 'BREEZE' registrations."

The Examining Attorney, on the other hand, contends in his brief that while he "cannot ignore a disclaimed portion of a mark and must view marks in their entirety, one feature of a mark may be more significant in creating a commercial impression." See, e.g., *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976). Here, as evidenced by the disclaimers thereof, the Examining Attorney maintains because the terms "SPA" and "POOL" are descriptive of the respective goods of applicant and the cited registrant, "the term BREEZE is clearly the dominant portion of the applicant's mark" and is likewise the dominant portion of the cited registrant's mark. Thus, the Examining Attorney argues that, "[a]side from the less significant portions of the marks, namely, the disclaimed descriptive terms 'SPA' and 'POOL', the marks ... are identical in sound, meaning and appearance." Further, the Examining Attorney urges that because such marks "are highly similar in overall commercial impression, the applicant's mark is likely to cause confusion with the registrant's mark." In particular, the Examining Attorney insists that "[p]otential consumers of the applicant's and registrant's goods are likely to view the terms 'SPA' and 'POOL' as a means to distinguish which 'BREEZE' chemicals are intended for use in spas and which ones are intended for use in swimming pools."

As to the third-party registrations relied on by applicant, the Examining Attorney notes among other things that such registrations are entitled to little weight on the issue of likelihood of confusion, correctly pointing out that third-party

registrations are not evidence of what happens in the marketplace or that the consuming public is familiar with the use of those marks. See, e.g., *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973); *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); and *In re Hub Distributing, Inc.*, 218 USPQ 284, 285-86 (TTAB 1983). The Examining Attorney, citing *In re National Novice Hockey League, Inc.*, 222 USPQ 638, 641 (TTAB 1984), also properly observes that inasmuch as "it has long been held that each case must be decided on its own merits, previous decisions by examining attorneys in approving marks are without evidentiary value and are not binding upon the agency or the board."

Moreover, and in any event, the Examining Attorney accurately asserts that "the term BREEZE is not a weak term for pool and spa chemicals in International Class 1" because, "[o]ther than the cited registration herein ..., the only other registered mark for pool or spa chemicals is ... Registration [No.] 2693895 [for the mark] OCEAN BREEZE for pool chemicals." The Examining Attorney thus concludes that, with respect to water treatment chemicals for swimming pools and spas, "the applicant's argument that the term BREEZE is weak is without merit."

We agree with the Examining Attorney that, overall, the marks "SPA BREEZE" and "POOL BREEZE" are so substantially similar as to be likely to cause confusion, mistake or deception when used in connection with commercially related water treatment chemicals for, respectively, spas and swimming pools. As our principal reviewing court has noted, while the marks at issue are

to be considered in their entirety, including any descriptive or generic terms, it is also the case that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entirety." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, according to the court, "that a particular feature is descriptive or generic with respect to the involved goods ... is one commonly accepted rationale for giving less weight to a portion of a mark" Id.

Here, we concur with Examining Attorney that the dominant and distinguishing element of both applicant's "SPA BREEZE" mark and the cited registrant's "POOL BREEZE" mark is the arbitrary or fanciful word "BREEZE," given the lack of source-indicative significance inherent in, respectively, the generically descriptive terms "SPA" and "POOL." Although, concededly, such terms do not look or sound alike and they do not have the same meaning since a spa is obviously not a swimming pool, overall the marks are not only structurally identical, in that the terms "SPA" and "POOL" precede the source-indicative word "BREEZE," but such marks engender a substantially similar overall commercial impression when used in connection with, respectively, "chemicals for treating spas" and "pool care chemicals for swimming pools." As the Examining Attorney persuasively argues in his brief, "consumers are highly unlikely

to differentiate" as to source or sponsorship the applicant's "SPA BREEZE" chemicals for treating the water in a spa and the cited registrant's "POOL BREEZE" chemicals for care of the water in a swimming pool. Instead, as the Examining Attorney further points out, "consumers are likely to believe that the registrant's [or applicant's] company markets two different lines of BREEZE chemical products, one designed specifically for spas and one designed specifically for pools."

Finally, while we disagree with applicant, for the reasons set forth by the Examining Attorney, that the marks at issue are weak and thus should be entitled to only a narrow scope of protection, it is still the case that the record shows that there is a subsisting third-party registration for the mark "OCEAN BREEZE" for "pool chemicals." Although the goods set forth in such registration are of course identical to those of the cited registrant and are commercially related to those of applicant, the mark which is the subject thereof is different than those at issue herein. The mark "OCEAN BREEZE" denotes a breeze off the ocean, a connotation which is absent from the marks "SPA BREEZE" and "POOL BREEZE." Furthermore, the term "OCEAN," in stark contrast to the terms "SPA" and "POOL," is not generically descriptive of the use of water treatment chemicals, such that the marks "SPA BREEZE" and "POOL BREEZE" are far more similar to each other than either of such marks is to the mark "OCEAN BREEZE." Consequently, the overall commercial impression conveyed by the mark "OCEAN BREEZE" differs significantly from the substantially similar commercial impression which is

engendered by the marks "SPA BREEZE" and "POOL BREEZE" at issue herein. Nonetheless, to the extent that the coexistence of a third party's registration for the mark "OCEAN BREEZE" for "pool chemicals" with the cited registrant's registration for the mark "POOL BREEZE" for "pool care chemicals for swimming pools" may serve to create any possible doubt as to whether applicant's mark "SPA BREEZE" for "chemicals for treating spas" is likely to cause confusion with the latter, we resolve such doubt, as we must, in favor of the cited registrant. See, e.g., In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); and In re Pneumatiques Caoutchouc Manufacture et Plastiques Kelber-Columbes, 487 F.2d 918, 179 USPQ 729, 729 (CCPA 1973).

Accordingly, we conclude that consumers who are familiar or otherwise acquainted with the cited registrant's "POOL BREEZE" mark for "pool care chemicals for swimming pools" would be likely to believe, upon encountering applicant's substantially similar mark "SPA BREEZE" for "chemicals for treating spas," that such commercially related products emanate from, or are otherwise sponsored by or affiliated with, the same source. In particular, as previously noted, consumers would be likely to regard applicant's "SPA BREEZE" goods as part of a line of water treatment chemicals for spas and swimming pools which originates from or is sponsored by the same source as markets the cited registrant's "POOL BREEZE" goods.

Decision: The refusal under Section 2(d) is affirmed.